Supreme Court, U.S.
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No. 92-199

In The

Supreme Court of the United States

October Term, 1992

IRENE ROBBINS AND BERT SHEPHERD, As Trustees Of The Davis Robbins Family Trust And The Davis Robbins Marital Trust,

Petitioners,

v.

PAINEWEBBER INCORPORATED, JOHN DAY, JERRY W. PAYNE, W. DAVID EAST, Jr., And DAVID L. ARNOLD,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

Did the Eleventh Circuit, when it reversed a district court order vacating an arbitration award, employ a method and standard of review that are so divergent from other circuits that this case presents an intolerable conflict between the circuits requiring this Court's immediate attention?

II.

Was the Eleventh Circuit's confirmation of the arbitration award in this case so fundamentally wrong that this Court should grant a writ of certiorari in order to review that decision?

PARTIES INVOLVED

RESPONDENT PAINEWEBBER INCORPORATED'S CORPORATE DISCLOSURE STATEMENT

PaineWebber Incorporated is a wholly-owned subsidiary of PaineWebber Group Incorporated, the stock of which is publicly listed and traded on the New York Stock Exchange. The following are subsidiaries of PaineWebber Incorporated:

1. Mitchell Hutchins Asset Management, Inc.
    a. Mitchell Hutchins Institutional Investors, Inc.
2. BEPWI SUB, INC.
3. PaineWebber Specialists Incorporated
4. PaineWebber Properties Incorporated
    a. Rotan Mosle Realty Advisors, Inc.
    b. Rotan Mosle Realty Investments, Inc.
    c. Rotan Mosle Realty Associates, Inc.
    d. Realty Southwest Investment Group III, Inc.
    e. Realty Southwest Services, Inc.
    f. Realty Southwest Investment Group, Inc.
5. PWJC Insurance Sales Incorporated
    a. PWJC Insurance Sales (Arizona) Incorporated
    b. PWJC Insurance Sales (Massachusetts), Inc.
    c. PWJC Sales Agency Incorporated

RESPONDENT PAINEWEBBER INCORPORATED'S CORPORATE DISCLOSURE STATEMENT–Continued

d. PWJC Insurance Sales (Montana), Inc.

e. PWJC Insurance Sales (Wyoming), Inc.

f. PWJC Insurance Services (Illinois), Inc.

g. PW Insurance Agency (Ohio) Incorporated

h. PW Insurance Agency (Arkansas) Incorporated

6. PaineWebber Incorporated of Puerto Rico

   a. PW International Incorporated of Puerto Rico

7. PaineWebber (B.C.) Limited

8. PaineWebber Advertising Associates, Inc.

9. PW Insurance Agency of Puerto Rico, Inc.

10. BEDCO Leasing Company, Inc.

    a. Channelview Leasing Company, Inc.

11. Wall Street Realty Corporation

12. PWPR Corporation

13. PaineWebber Realty Investments Incorporated

14. PaineWebber Chairman's, Inc.

15. Rotan Mosle Financial Corp.

    a. Rotan Mosle Insurance Agency, Inc.

    b. Rotan Mosle Investments, Inc.

    c. Capital Investment & Trust Company

RESPONDENT PAINEWEBBER INCORPORATED'S CORPORATE DISCLOSURE STATEMENT–Continued

d. Rotan Mosle Investment Ventures, Inc.

e. Rotan Mosle Technology, Inc.

f. Rotan Mosle Energy, Inc.

16. Blyth Eastman PaineWebber Servicing, Inc.

a. Katella Realty Corporation

b. Sixth Avenue

1. RM Branford Corporation

2. RML Leasing Corporation

3. RMM Corporation

4. RMZ Corporation

c. Wyodak Construction Co., Inc.

17. Correspondent Services Corporation

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STATEMENT OF THE CASE

Introduction

In every phase of this litigation, the Petitioners have asserted arguments and conclusions under the guise of facts, a practice that continues before this Court in the Petitioners' Statement Of The Case. The Respondents take serious issue with virtually every argument asserted by the Petitioners. The evidence presented to the arbitration panel – the only entity authorized to make findings of fact in this litigation – was sharply disputed as to every issue. The Respondents have contended throughout this litigation that the evidence failed to support the Petitioners' allegations, which include fraud, churning, unsuitable trading, unauthorized trading, and misallocation. Obviously, the Petitioners draw different inferences and conclusions from the evidence and have stated those inferences and conclusions in their Statement Of The Case – often without fully disclosing the relevant underlying facts.

In the interest of brevity, and for the purpose of showing that the Respondents' view of this case is supported by the evidence presented to the arbitrators, the Respondents' Statement Of The Case will present the evidence most favorable to the Respondents. In addition to the facts recounted in this Brief, the Respondents adopt and incorporate by reference the statements of fact set out in the Eleventh Circuit's opinion, which is reproduced as Appendix B to the Petition.

A. The Lawsuits. Irene Robbins and Bert Shepherd ("Petitioners"), filed this action against PaineWebber Incorporated ("PaineWebber"), John Day, and Jerry Payne

in Alabama state court. (R1-1).[1] The case was removed to the United States District Court for the Northern District Of Alabama on June 14, 1988. (*Id.*) Based upon arbitration clauses in brokerage account documents signed by the Petitioners, the district court stayed the case and referred all claims to arbitration. (R1-230, 231). On April 10, 1989, the Petitioners filed a related suit against David Arnold, David East, and others. (R2-290). The claims against East and Arnold were also referred to arbitration. (1SR-292A).

B. The Arbitration. The Petitioners' Statement of Claim, as amended, asserted five claims: (1) wrongful allocation of trades; (2) unauthorized trading; (3) "churning" of the accounts; (4) unsuitable investments; and (5) unauthorized use of margin. The Petitioners sought recovery for violations of the Securities Exchange Act of 1934, the Alabama Securities Act, and the Racketeer Influenced and Corrupt Organizations Act, and for common law fraud, negligence, breach of fiduciary duty and conversion. (Ex. Box 3-Amended Statement of Claim). All claims were heard before an arbitration panel in 12 days of hearings that generated 2,772 pages of transcript and involved live and deposition testimony from 25 witnesses and thousands of pages of exhibits.

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[1] Record citations in this brief are made first to the Record or Supplemental Record volume, then to the document number, then to the specific page number(s) to which reference is made. Citations to the arbitration transcript, which was part of the record on appeal to the Eleventh Circuit, will be made with the notation (TR- *[page number(s)]*. References to the Appendix submitted with the Petition shall be made with the notation (PA *[appendix letter]* at *[page number(s)]*).

C. The Evidence.

1. The Parties. Petitioners are trustees of two family trusts (the "Trusts") established by Irene Robbins' now-deceased husband. (Ex. Box 2-PX 1,2).[2] John Day, David East, and David Arnold were brokers at PaineWebber's Birmingham, Alabama office during the time that the Petitioners maintained brokerage accounts there. Jerry Payne was the PaineWebber Office Manager.

2. The Trust Accounts. In early 1983, the Petitioners opened securities accounts for the Trusts at Thomson-McKinnon Securities, Inc. ("Thomson-McKinnon"). (Ex. Box 3-RX 87). The Petitioners had a history of short-term, speculative trading at Thomson-McKinnon, and authorized John Day, who was their broker at that firm, to handle their accounts in that manner on a discretionary basis "as long as [the Trusts] were making money". (Ex. Box 3-RX 87; TR- 2490, 2133-34, 2385-86, 2144-45). When Day began working at PaineWebber in late 1987, the Petitioners moved the trust accounts with him because they were satisfied with the way Day had managed their accounts at Thomson-McKinnon. (TR- 2166). While at PaineWebber, Day continued to handle the Petitioners' accounts in essentially the same manner he had handled them at Thomson-McKinnon – through short-term, discretionary trading. (TR- 2490, 2496-97).

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[2] References to Petitioners' exhibits admitted during the arbitration will be made with the notation (PX [exhibit number]). Respondents' exhibits will be noted (RX [exhibit number]).

3. *Evidence Regarding Unauthorized Trading Claims.* John Day began trading index options in the trust accounts on November 30, 1987. (Ex. Box 3-RX 6, Marital Trust, 4B-4, 7; Family Trust, 4B-3, 5). Bert Shepherd testified that, in early December 1987, he specifically authorized Day to "bop in and out" of index options, immediately following Shepherd's receipt of the confirmations of his first index option trades. (Ex. Box 1-TR-1832-33, 1837-38). With Shepherd's knowledge and approval, Day purchased over $600,000 worth of index options for the Petitioners during December 1987 alone. (Ex. Box 3-RX 6 - Marital Trust 4B-4, 7; Family Trust 4B-3, 5).

4. *Evidence Regarding Misallocation Claim.* The Petitioners' "preferential allocation" claim was premised on two arguments:

(1) That the time stamps on the allocation tickets and wires somehow demonstrated that Day failed to assign account numbers to the trades until several hours after they were placed; and
(2) That virtually every trade for the Petitioners resulted in a loss, while virtually every trade for the brokers was profitable.

The evidence presented to the arbitrators, however, demonstrated that neither of those contentions was supported by the facts of record.

First, Petitioners argued to the arbitrators that Day's purchases of index options were "left open" or "unallocated" or "unassigned," based solely upon the difference between the time the trade was executed (the

time appearing on the "execution wire") and the time the trade was processed through PaineWebber's wire system (the time appearing on the trade ticket and the "allocation wire"). If the evidence in this case established anything, however, it established that it is impossible to ascertain from the times appearing on the trade tickets and wires when John Day gave his tickets to the wire operators. PaineWebber wire operators testified that they treated allocation tickets as low-priority items (Ex. Box 1-TR- 1393-94, 1591, 1644)[3]; that they did *not* process allocation tickets immediately upon receipt (Ex. Box 1-TR- 1393, 1644); that the time stamps on the allocation tickets indicate only when the wire operators got around to processing those tickets (Ex. Box 1-TR- 1428, 1593, 1688); and that nobody can determine when Day turned in his tickets based upon the times appearing on them (Ex. Box 1-TR- 1427-28).

On the more critical issue of when John Day *assigned* account numbers to the trades, both expert witnesses testified that it was impossible to tell from the tickets and wires when Day filled in the account numbers on the trade tickets. (Ex. Box 1-TR- 1122, 2504-05).[4] In fact, the only direct evidence on this issue was that the trades were made for particular accounts and that Day assigned

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[3] That testimony is also consistent with the extensive experience of James Brucki, Respondents' expert witness. (Ex. Box 1-TR- 2502-03).

[4] The wire operators also testified that it is impossible to tell when John Day filled out his tickets from looking at the time stamps on the wires and tickets. (Ex. Box 1-TR- 1427, 1686-7).

account numbers to the trades as he placed the orders with PaineWebber's block trading desk in New York.[5]

The Petitioners' second premise for their misallocation theory – that virtually every trade placed for the Petitioners resulted in a loss while virtually every trade placed for the brokers resulted in a profit – was also unsupported by the evidence presented to the arbitrators. (Ex. Box 1-TR- 2501-02). That argument is based upon the artificial matching of trades on a first-in, first-out basis, a method which was contrary to the facts presented to the arbitrators and which had the effect of distorting the percentage of profitable trades versus losing trades placed for the Petitioners' accounts. Matching trades properly, and then considering only the short-term trades in the Petitioners' accounts, the evidence revealed that almost 70% of the Petitioners' short-term trades were actually profitable. (Ex. Box 1-TR- 2510-14).

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[5] David Arnold testified in his deposition that he knew about each and every trade that Day made for his account in advance of it being made. (Ex. Box 2-Arnold deposition - 90, 91, 94). John Day testified in his deposition that he recorded the account number on a yellow legal pad or on the ticket itself when he placed the orders for options trades. (Ex. Box 2-Day deposition - 227, 267-68). The PaineWebber Operations Manager, a wire operator, and John Day's sales assistant all testified that Day turned in allocation tickets when asked, (TR- 1427), that Day's allocation tickets were always sitting on his desk, filled out with the account number on them (TR- 1685), and that Day had been observed several times filling out an allocation ticket with the account number while speaking with the block trading desk. (TR- 1592-95).

Furthermore, the arbitration panel was presented with substantial affirmative evidence that no misallocation occurred. As previously discussed, the evidence established that John Day assigned account numbers to trades at the time they were placed with the block trading desk, and that approximately 70% of the short-term trading in the Petitioners' accounts resulted in profits. In addition, Respondents' expert directed the panel's attention to numerous examples of trades which were inconsistent with the Petitioners' theory and which could *not* have involved a misallocation. (TR- 2515-20, 2526-28).

5. Evidence Regarding Churning and Unsuitability Claims. The Petitioners' claims of churning and unsuitability were refuted by the evidence presented to the arbitrators. The account documents – including option agreements – signed by the Petitioners to open the PaineWebber accounts demonstrate that the Petitioners' investment objectives were speculative in nature. (TR-1108, 1300, 1307). Moreover, expert witness James Brucki offered compelling testimony for the Respondents that the trading in the Robbins Trust accounts was neither excessive nor unsuitable. The Petitioners' aggressive investment strategy was demonstrated by the following factors: the Petitioners' history of very active speculation at Thomson-McKinnon (TR- 2490; Ex. Box 3-RX 87); Bert Shepherd's approval of that level of trading as long as Day was making money for the accounts (TR- 2133-34, 2144-45); the PaineWebber option agreements signed by the Petitioners confirming that speculation was one of their objectives (Ex. Box 2-PX 11, 12); and Day's deposition testimony that the Petitioners desired to engage in active trading, a desire which only intensified after the

October 1987 market crash. (Ex. Box 2-Day deposition - 71-72, 78). Mr. Brucki testified that both the level of trading activity and the type of trading were consistent with the Petitioners' investment objectives. (TR- 2488-91, 2596). That expert testimony was amply supported by the objective evidence of record.

6. *Evidence Regarding Fraud Claims.* The Petitioners contend that the arbitrators were presented with "uncontroverted evidence" that the Respondents made fraudulent representations or suppressions of fact. *See* Petition at 17-18, 25. The Petitioners' fraud claim is based on the alleged misallocation of trades, discussed above, and on a tape-recorded conversation between Petitioners and John Day. Contrary to Petitioners' insistence that the arbitrators in this case "could not fail to find material untrue statements and omissions," *id.* at 25, the evidence did not support any finding of actionable fraud.

As stated above, abundant evidence was offered to refute the Petitioners' misallocation claims. Because the arbitrators concluded that there was no misallocation, they consequently could not have found that the respondents fraudulently refused to disclose the existence of such a scheme. Regarding the taped conversation with John Day, this conversation likewise did not constitute fraud. First, this conversation took place on February 24, 1988, after virtually all of the unprofitable trading occurred in the Trust accounts. The Petition asserts that similar "misrepresentations had begun as far back as December 1987", *id.* at 18, but the transcript excerpts

cited by the Petitioners wholly fail to support this allegation. The testimony cited by Petitioners does not refer to any conversation prior to February 10, 1988.[6]

Second, none of the alleged misrepresentations during the taped conversation related to the sale or purchase of a security. John Day discussed the general condition of the Trust accounts and the prospects for recovering losses sustained by the accounts, but made no misrepresentations relating to any specific sale or purchase.

Finally, Bert Shepherd testified that by February 2, 1988 – over three weeks prior to the taped conversation – the Petitioners had already retained counsel, did not trust John Day, and did not rely on anything he told them after February 2 in deciding whether or not to purchase options.[7]

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[6] Transcript pages 1788-90 refer only to statements made by PaineWebber employees between February 10-15 about John Day's trip to Brazil to visit a sick aunt, and similar statements made by Day on February 16; pages 1982-87 refer only to a February 16 conversation between Day and a beneficiary of one of the Trusts; pages 2103-04 refer to a February 17 meeting; pages 2110-14 refer to a conversation on February 24; and pages 2269-81 refer to conversations on February 16 and 17.

[7] (TR- 1809). Counsel for John Day asked the following question to Bert Shepherd:

Q. And just so that we are clear, it is your testimony, sir, that you had, during that time period that we are talking about, you never relied on anything that Mr. Day said to you in connection with a decision by you as trustee of any of these trusts to purchase any option by either of these trusts, correct?

A. That's right, yes.

Id.

F. The Arbitrators' Decision. At the conclusion of the evidence, the arbitrators dismissed all claims against East, Arnold and Payne, which claims were founded solely on Petitioners' theory of misallocation. (TR- 2672, 2676, 2680). As to PaineWebber and Day, the panel instructed the parties at the close of the arbitration hearing that the only possible claims remaining at that time were for negligence, breach of fiduciary duty, and fraud.[8] The written award, which was rendered on January 10, 1991, imposed damages in the amount of $325,000 against PaineWebber and Day but did not explain the legal or factual basis for the decision or the methodology for calculating damages. (R1-248-Ex. A).

G. The District Court's Review Of The Arbitration Award. The arbitration respondents filed motions with the district court seeking confirmation of the arbitration award. (R1-248; R2-296, 297). The Petitioners moved to vacate the award and also asked the district court to reinstate the proceedings on the district court's trial docket. (R1-252). Before ever seeing the arbitration transcript or the vast majority of the exhibits and deposition transcripts introduced at the arbitration, the district court notified the parties in writing of its intention to vacate the arbitration award.[9] On April 19, 1991, the district

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[8] Thus, by implication the arbitrators dismissed Claimants' claims for conversion and for violations of the Securities Exchange Act and the Alabama Securities Act. The arbitrators expressly dismissed Claimants' conversion and RICO claims (Ex. Box 1-TR- 2673-74; PA D at D-3).

[9] The district court initially had set a schedule for the parties to submit briefs on the pending motions and scheduled a hearing. (R1-253, 255; SR1-254). After briefs were submitted, the

court entered the official Order and Memorandum Opinion that vacated the arbitration award, terminated the stay, and set the consolidated cases on the Court's June 3, 1991 trial docket.[10] (PA A). The district court found that the arbitration panel made an erroneous evidentiary ruling by allowing certain indicted Respondents to invoke their fifth amendment privilege. (PA A at A5-6). The district court further determined that the panel's denial of the Petitioners' RICO and Alabama Securities Act claims constituted a manifest disregard of the law. (PA A at A-7-8).

H. The Eleventh Circuit's Reversal and Confirmation of the Arbitration Award. On February 27, 1992, the Eleventh Circuit reversed the district court, holding that the arbitration award, with its strong presumption of correctness, should have been reviewed only under the limited grounds set out in the Federal Arbitration Act.

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district court sent a letter to all counsel stating that the hearing on the pending motions had been cancelled. The letter informed the parties that the district court had decided to grant the Petitioners' motion to vacate and that a written order would be forthcoming. (The March 20, 1991 letter was submitted to the Eleventh Circuit as Appendix D to PaineWebber's brief.) At the time this letter was written, the district court had seen only the briefs and a few arbitration exhibits submitted by the Petitioners and PaineWebber, and some transcript excerpts submitted by PaineWebber. On April 1, 1991, twelve days *after* the court announced that it was going to grant the Petitioners' motions, the Petitioners filed the arbitration record and transcript. (R1-256).

[10] The district court thereafter granted the Respondents' motion to stay its proceedings pending appeal.

(PA B). The Eleventh Circuit concluded that the Petitioners had not met their burden of refuting the presumption that the arbitral award was correct, nor had the Petitioners discredited each and every factual basis upon which the arbitrators' award could have been based. The Eleventh Circuit held that the arbitrators had "stayed well within their broad discretion in facilitating a fair hearing and in fashioning the award." (PA B at B-11).

I. **Recent Developments.** On June 9, 1992, the Petitioners filed in the district court their Motion For Trial Setting On Claims Unresolved In Arbitration. The Petitioners' motion asked the district court to consider and decide their statutory claims, on the rationale that the arbitrators had failed or refused to recognize their statutory causes of action. On August 17, 1992, the district court overruled the Petitioners' motion, holding that the arbitrators considered and ruled on all of the Petitioners' claims, including their statutory claims. On the same date, the district court confirmed the arbitrators' award and entered a judgment for the amount of the award.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE FACTS AND PROCEDURAL HISTORY OF THIS CASE DO NOT SUPPORT THE QUESTIONS PRESENTED IN THE PETITION.

None of the four Questions Presented For Review set out in the Petition are sufficient to justify the granting of a writ of certiorari. With respect to at least three of the questions posed by the Petitioners, those questions as

framed are not only meritless, they are not even applicable to this litigation.

A. The Arbitrators In This Case Did Not Refuse To Recognize Statutory Claims.

The Petitioners contend that the arbitrators "refused to recognize" the Petitioners' statutory fraud claims because they did not award statutory damages despite the "uncontroverted evidence" of fraud. As discussed above, the Petitioners' evidence of fraud was not uncontroverted, nor was it persuasive to the arbitrators. The Petitioners' refusal-to-recognize argument is a by-product of their unfounded conviction that they proved fraud to the arbitrators. A fair reading of the arbitration record, however, leads to the unavoidable conclusion that the arbitrators fully recognized that the Petitioners asserted statutory claims for fraud; the arbitrators simply declined to accept those allegations. This interpretation is confirmed by the district court, which acknowledged its August 17, 1992 order that the arbitrators *had* considered the Petitioners' statutory claims. Accordingly, the Petitioners' argument that their statutory claims were not recognized or considered by the arbitrators is not applicable to this petition.

B. The Standard That The Eleventh Circuit Should Employ To Review A District Court's Findings Of Fact Are Not Applicable To This Case.

The arbitration hearing is the only phase of this litigation where findings of fact could appropriately be made. The consideration of the evidence presented at the

hearing is the exclusive function of the arbitrators themselves. When "the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987). When motions are filed asking the district court to confirm or vacate those findings of fact, the district court's role is extremely limited. "[C]ourts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *Id.* at 38. Thus, the district court in this case should not have undertaken to substitute its own opinions about the merits of the case for the factual findings made by the arbitrators who actually heard and viewed the evidence first-hand.

The Petitioners argue that the Eleventh Circuit should have reviewed the district court's findings of fact under a "clearly erroneous" or abuse of discretion standard of review. This argument is based upon a faulty premise: that the district court had the authority to reweigh the evidence and second-guess the arbitrators' factual findings. Unquestionably, the district court did not have that power. Findings of fact may be made only by the arbitral entity that has heard evidence first-hand. The only opportunity for a district court to make findings of fact in the context of confirmation or vacatur of an arbitration award is when an evidentiary hearing is held by the district court on an issue such as arbitrator bias. Except for those limited circumstances, findings of fact

are not made at the district court level. No such evidentiary hearing was held in this case. Despite these limitations, the district court's vacatur opinion makes such statements as "[t]he record on its face supports a finding of fraud and deceit" (PA A at A-7-8), and "[t]he wrongs committed were not acts of negligence." (*Id.* at A-7 n.5). These somewhat ambiguous statements are subject to two interpretations: (1) the district court made findings of fact based solely upon its review of the arbitration record, or (2) the court concluded as a matter of law that the arbitrators' findings on these issues were erroneous. Under either scenario, the Eleventh Circuit was entitled to review the district court's action *de novo*. If the district court attempted to act as fact-finder, that attempt to enlarge the court's function was subject to *de novo* review and was grounds for reversal. If the district court made conclusions of law about the arbitrators' treatment of the evidence, those conclusions are subject to *de novo* review.

This case does not involve a court of appeals' review of independent findings of fact made by a district court. Consequently, this case does not properly present this Court with the question of what standard a court of appeals should use to review findings of fact by a district court.

C. The Arbitrators Did Not "Refuse To Allow Plaintiffs To Question Defendants Who Had Obtained An Order For Arbitration."

At the time of the arbitration hearing, some of the individual respondents (the "Brokers") were under

indictment and, therefore, invoked their Fifth Amendment privilege at the hearing. Contrary to the Petition, however, the arbitrators did not refuse to allow the Petitioners to question those individuals. As the Eleventh Circuit noted, Petitioners' counsel represented to the arbitration panel on several occasions before and during the arbitration hearing that the Brokers were entitled to plead the Fifth Amendment,[11] that the Brokers' testimony was unnecessary to the Petitioners' case,[12] and that the Petitioners "had pretty much foregone" any argument that the Brokers had waived their Fifth Amendment rights.[13]

More importantly, the arbitration record shows that the arbitrators *did* allow the Petitioners to question the Brokers, and that the Brokers did not make a "blanket

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[11] Petitioners' counsel stated in a letter to the arbitration panel: "If the defendant (or Respondent) wishes to plead the Fifth Amendment at trial (or hearing), he can do so. But the trial (or hearing) should go on as scheduled." (Ex. Folder, Appendix G to PaineWebber Brief).

[12] (TR- 1049).

[13] Counsel for Petitioners stated to the arbitrators:

> . . . [The waiver-of-fifth-amendment issue] is one thing that Petitioners have foregone. There is a tremendous waiver issue here. . . . In the interest of time we are not even bringing that up. We could every five minutes be screaming for the panel to instruct them to answer on the grounds that they waived the Fifth. . . . I am saying in the interest of time, we have pretty much foregone the issuance *(sic)* of the waiver. I don't intend to ask the panel to instruct anybody to answer a question over their desire to plead the Fifth or anything like that.

(TR- 1053-54).

invocation" of their fifth amendment rights. At the arbitration hearing, the Brokers took the witness stand, and invoked their rights in response to each question put to them. (TR- 1060-69). Petitioners' counsel stipulated that the Brokers would take the fifth as to any substantive questions, and the Brokers themselves confirmed that intention while on the stand. (*Id.*). The arbitration panel simply accepted the parties' stipulation. Having been informed by Petitioners' counsel that the only additional questions he proposed were for the purpose of authenticating documents already in evidence, or to prove facts conclusively established by those documents, the panel indicated that it would not allow additional examination on those topics. (TR- 1041-42). The panel made clear, however, that other questions would be permitted. (*Id.*) Petitioners' counsel stated that certain banking and transaction records were "about all" he wanted to question the brokers about, and stated that if his Exhibit D-9, a chart concerning trade financing, was admitted into evidence, he would "not need to question the brokers about those transactions." (*Id.* at 1056-57). The exhibit was admitted. (*Id.* at 1064).

When the arbitration record is viewed fairly and completely, it is clear that counsel for the Petitioners was given an opportunity to ask each Broker substantive, non-repetitive, non-cumulative questions, but declined to do so. Consequently, the facts of this case do not support the Petitioners' question of whether arbitrators may refuse to allow plaintiffs to question witnesses.

The facts and procedural history summarized above demonstrate that three of the four questions presented by

the Petitioners are not properly before this Court. PaineWebber contends that the Petitioners' arguments in support of granting the writ actually present two basic questions, which are set out in PaineWebber's Questions Presented. As discussed below, neither of these questions are sufficient to make this case appropriate for certiorari review.

II. THE ELEVENTH CIRCUIT'S REVIEW OF THE DISTRICT COURT'S VACATUR ORDER IS CONSISTENT WITH THE FEDERAL POLICY FAVORING ARBITRATION AND DOES NOT WARRANT EXERCISE OF THIS COURT'S CERTIORARI JURISDICTION.

A. The Eleventh Circuit's *De Novo* Review Of The Actions Of The District Court Do Not Present A "Certworthy" Issue For This Court.

The provisions of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, "manifest a 'liberal federal policy favoring arbitration agreements.'" *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S. Ct. 1647, 1651 (1991). It is well-settled that the arbitration process established under the Federal Arbitration Act is a valid and judicially-favored means of resolving disputes in appropriate cases, such as when the parties expressly agree in a contract to arbitrate disputes arising out of the performance of that contract. *See, e.g., Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218-19 (1985). The general policy considerations favoring arbitration are the foundation for specific presumptions governing every aspect of the arbitration process. Similarly, it is well-established that "[c]ourts are generally prohibited from vacating an arbitration award

on the basis of errors of law or interpretation." *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, 857 F.2d 742, 746 (11th Cir. 1988)(citing *Wilko v. Swan*, 346 U.S. 427 (1953)).

Because of these principles, the role of the federal judiciary – from the district court to this Court – in reviewing an arbitration award is narrowly drawn and limited. Unless the arbitration hearing is fundamentally unfair because of certain limited factors set out in the Federal Arbitration Act, 9 U.S.C. § 10(e) (1988), the court's duty is to confirm the award. In this case, however, the district court ignored the well-defined statutory and judicial constraints that govern review of arbitral awards and essentially reweighed the merits of the controversy. Without hearing any evidence, the district court made its own findings of fact,[14] made rulings on evidentiary questions, and drew its own conclusions regarding liability and damages.

Against this procedural backdrop, the Eleventh Circuit would have been remiss if it had blithely glossed over the district court's actions under the convenient "abuse of discretion" or "clearly erroneous"[15] standards

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[14] See discussion at Section I(B), *supra*.

[15] In advancing the clearly erroneous standard of review, the Petitioners have shifted from their position before the Eleventh Circuit, where they argued strenuously that the district court's actions should be reviewed under an abuse of discretion standard. The "clearly erroneous" standard now urged by the Petitioners is clearly a semantical attempt to manufacture a conflict with *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). The *Pullman-Standard* decision applied that standard to findings of fact made by a district judge during a bench trial, not to a

of review. When a district court vacates an arbitral award, there should be no presumption in the appellate court that the district court acted within its discretion. At a minimum, when a district court decides as a matter of law to vacate an arbitration award, that decision should be reviewed by this Court on a *de novo* basis. This standard of review is consistent with the favored role of arbitration and the judicial presumption in favor of arbitration awards. Where the decision of the arbitrators is being upheld, the abuse-of-discretion standard of review is entirely consistent with federal policies and presumptions in favor of arbitration. Where the district court has *granted* a motion to vacate, however, no presumption of correctness should attach to that decision. Because the district court in that situation has acted contrary to the presumption in favor of arbitration awards, this Court should conduct an independent review of the issues on which vacation or confirmation of the award depend. The Fifth Circuit's analysis of this issue is instructive:

> In adopting *de novo* review here, we emphasize the unique context of arbitration, which conditions judicial review by compelling deference to findings that precede the district court. . . . In the arbitration context, granting the deference ordinarily due the district court risks forgetting the prior and critical deference due the findings of the arbitration panel. *De novo* review on the ultimate issue of unfairness enables us to assess whether the district court accorded sufficient

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court's review of an arbitrator's findings of fact. The clearly erroneous standard does not apply in this case. *See* Fed. R. Civ. Pro. 52(a)(findings of fact made by judge in trial are to be reviewed under clearly erroneous standard).

> deference in the first instance, an assessment that a more restrictive appellate review would cripple.

Forsythe Int'l, S.A. v. Gibbs Oil Co. of Texas, 915 F.2d 1017, 1021 (5th Cir. 1990).

The Eleventh Circuit's review of the district court in this case reflects a correct understanding of the policies and goals underlying the Federal Arbitration Act. Despite the Petitioners' assertions, the cases cited by the Eleventh Circuit do not indicate a conflict among the circuits. At most, the Eleventh Circuit has recently clarified the standard by which it will review confirmation proceedings in the district courts. Because no inter-circuit conflict exists, there is no reason for this Court to grant the petition.

B. The Eleventh Circuit's Rejection of the "Manifest Disregard" Standard Does Not Require This Court To Grant Certiorari In This Case.

In its opinion deciding this case, the Eleventh Circuit reiterated its unwillingness to adopt the practice of some circuits to vacate an arbitration award because the award demonstrates a "manifest disregard of the law." (PA B at B-8) The district court had held that the arbitrators' decision demonstrated a manifest disregard of the law, and that this disregard for the law justified vacating their findings. (PA A at A-6) The "manifest disregard" standard is not one of the express grounds for vacation or correction of an arbitration award set out in Sections 10 and 11 of the Federal Arbitration Act. Furthermore, there is an inherent difficulty in finding a manifest disregard of the law in an arbitration award that is not required to

state the underlying reasons for the award. Thus, the Eleventh Circuit correctly held that the district court was not justified in relying upon a non-statutory ground as the basis for vacating the findings of the arbitration panel in this case.

This case is not the proper vehicle for this Court to consider the viability of the manifest disregard standard. In the Eleventh Circuit, the Petitioners did not even rely upon the district court's use of the manifest disregard standard to uphold the vacatur order. After foregoing this argument below, the Petitioners should not be allowed to use the standard as the basis for invoking this Court's jurisdiction. In addition, there is no sharply defined conflict between the circuits regarding this issue. At least one court of appeals has noted that the manifest disregard standard is essentially "fungible" with other standards – "arbitrary and capricious," or "completely irrational" – used by the circuits to assess the fairness of an arbitration proceeding. *See Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990). Despite some differences in nomenclature, the circuits essentially employ the same process for reviewing arbitration awards, thus no substantial conflict exists.

This case is not an appropriate one for determining the viability of the manifest disregard standard. The peculiar facts of this case show that the district court did not properly apply the standard. Even in the circuits that recognize it, the manifest disregard standard has been interpreted "as necessarily meaning 'more than error or misunderstanding with respect to law.' Manifest disregard 'may be found "when arbitrators understand and correctly state the law, but proceed to disregard the

same." ' " *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, 857 F.2d 742, 747 n.4 (11th Cir. 1988)(citations omitted). The district court in this case tried unsuccessfully to accomplish the virtually impossible task of determining from a lump sum award that the arbitrators engaged in a manifest disregard of the law. There is no indication in this case that the arbitrators knew the law and then proceeded to make their findings in complete disregard for the law; nor does the district court cite any such evidence.

C. Neither Of The Purported Conflicts Advanced By The Petition Presents An Intolerable Conflict.

The Petitioners assert that two aspects of the Eleventh Circuit's review in this case – *de novo* review and the manifest disregard standard – demonstrate inter-circuit conflicts that must be resolved by this Court. As discussed above, neither of these areas presents a true conflict between the circuits. Furthermore, neither of these alleged conflicts warrant this Court's consideration. First, this case involves a factual and procedural history that is so convoluted that the Eleventh Circuit's method of review is significantly overshadowed by factual questions. Second, there is no indication that this case would have had a different outcome if the Eleventh Circuit had utilized the abuse-of-discretion or manifest disregard standards. Third, to the extent that there is a disagreement between the circuits, these issues have not had

sufficient time to "percolate" through the lower courts.[16] Fourth, the issues presented here are not sufficiently important for this case to warrant the attention of this Court. Not every difference of opinion between the circuits requires this Court's intervention. *E.g.*, Robert Stern, Eugene Gressman, Stephen Shapiro, *Supreme Court Practice* [hereinafter *"Supreme Court Practice"*] § 4.4 (6th ed. 1986). For all these reasons, the writ should not be granted.

III. THE ELEVENTH CIRCUIT'S DECISION IN THIS CASE DOES NOT PRESENT A FUNDAMENTALLY WRONG RESULT THAT JUSTIFIES GRANTING A WRIT OF CERTIORARI.

"It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions." *Supreme Court Practice* § 4.16 at 221 (6th ed. 1986). Nevertheless, the Petitioners contend that two aspects of the Eleventh Circuit's decision in this case are so fundamentally erroneous that this Court must grant the writ in order to correct those wrongs. This argument is unavailing. The Eleventh Circuit's decision is a correct one that does not require this Court's attention.

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[16] *See, e.g.*, Baker, *A Practical Guide To Certiorari*, 33 Cath. U. L. Rev. 611, 618 (1984)("process of percolation is ultimately good for the law"); Estreicher & Sexton, A *Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 684-704 (1984)(discussing benefits of allowing substantial examination of issues by lower courts before consideration by Supreme Court).

A. The Eleventh Circuit Did Not Confirm An Arbitration Award That Ignored The Petitioners' Statutory Causes Of Action.

The Petitioners discuss at length the principle that arbitration proceedings may not curtail the statutory rights of the parties, and contend that the arbitration award in this case failed to afford the Petitioners the remedies claimed under various statutory causes of action. As discussed above,[17] this argument is undercut by the unavoidable fact – recently noted by the district court that initially vacated the award – that the arbitrators *did* consider and rule against the Petitioners on their statutory claims, including the securities fraud claims.

The arbitral award in this case is supported by numerous proper bases which can be inferred from the record. Contrary to the arguments of counsel and the conclusions of the district court, none of those bases "by necessity" involved any finding of fraud. Because the arbitrators did not provide any express rationale for their decision, the Petitioners can only speculate that the Award was based upon some improper ground. It is apparent, however, that there are a number of possible bases for the Award. Any combination of possibilities would certainly be appropriate under the facts of this case.

In sum, the Eleventh Circuit correctly determined that the arbitration process did not deprive the Petitioners of the rights to present their statutory claims.

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[17] *See* discussions at pages 10, 13, *supra*.

Consequently, there is no fundamental error to invoke this Court's certiorari jurisdiction.

B. The Eleventh Circuit Did Not Deprive The Petitioners Of A Fair Arbitration Hearing By Confirming An Award Based Upon An Erroneous Application Of The Fifth Amendment.

The Eleventh Circuit correctly reversed the district court's rulings on two fifth amendment issues – blanket invocation and waiver – because those rulings were completely at odds with the applicable law and with stipulations made by counsel for the Petitioners during the arbitration. Courts traditionally give great weight to arbitrators' procedural decisions. *See, e.g., John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)(matters of procedure lie solely within the discretion of the arbitrator). The district court found, however, that the arbitration panel's treatment of the fifth amendment issues independently justified vacatur of the arbitration award. As discussed above,[18] the arbitration record demonstrates clearly that the Brokers did not waive their fifth amendment rights; that the manner in which the privilege was asserted was reasonable and appropriate; and that the Petitioners waived any conceivable right to insist that the fifth amendment could not be asserted by the Brokers.[19]

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[18] *See* pages 15-17, *supra*.

[19] In addition, there was no basis for the arbitrators to find that the individual respondents had waived their fifth amendment rights. Because there was no suggestion that the Brokers were aware of any criminal investigation at the time their depositions were taken, there is no basis to conclude that they could

The evidentiary rulings made by the arbitration panel were fully within the authority of the panel, whose award was correctly confirmed by the Eleventh Circuit.

CONCLUSION

The Petitioners do not raise any "certworthy" questions that justify the granting of a writ of certiorari to the Eleventh Circuit. The Petition does not present this Court with any significant conflict between the circuits, fundamental error below, or other compelling reason to grant the writ. Consequently, the Petition is due to be denied.

Respectfully submitted this 28th day of August, 1992.

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have asserted the fifth amendment at that time. *See, e.g., Zicarelli v. New Jersey Investigative Comm'n*, 406 U.S. 472 (1972) (privilege cannot be asserted when criminal prosecution is merely a "speculative possibility"). Thus, the Petitioners did not demonstrate to the arbitrators that the Brokers waived the privilege by giving deposition testimony because, at the time of those depositions, the witnesses had no privilege to assert.

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